SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

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OCTOBER TERM, [redacted] 1970

No. 213 [redacted]

ACTION REALTY CO., CHARLES LASKO, JOSEPH D. BERKE, BERNARD FRIEDMAN, TIME READ ESTATE, BEST REALTY, A. WEINBERG REALTY, INC. d/b/a BEST REALTY, AL WEINBERG, DUKE WEINBERG, JOHN KARRAS, SUREWAY INVESTMENT CORP., WILLIAM F. SMITH, W. F. SMITH & CO., M. E. STEIN & CO., HOWARD SAMOTNY, IRWIN SPECTOR, GERALD H. CRANE, SAFEWAY REALTY COMPANY, MAX D. DRESHER, EMANUEL GOLDMAN, SIDNEY B. GOLDMAN, BENJAMIN R. HARRIS, GERTRUDE R. HARRIS, HARRY M. ORLOVE, ETHEL ORLOVE, CHARLES G. REIMANN, LORRAINE REIMANN, ROSALIND STEIN, JEROME YAVITZ, LESTER YAVITZ, AUSTIN BOND & MORTGAGE CO., WELLS MANAGEMENT CO., LOOP MORTGAGE CO., GIFFORD INVESTMENT CO., JOSEPH MILLER, ALL-SCOT REALTY, GEORGE WALDMAN, LEE INVESTMENT COMPANY, HERBERT LISS, MAX EDWARD STEIN, HOWARD SAMOTNY & ASSOCIATES, ROBERT GOLDBERG, WILLIAM V. BARNETT, WILLIAM GLASSBERG, MELVIN B. EHRLICH, BEN KATZ, WILLIAM H. SEIDE, and WEST CERMAK REALTY,

Petitioners,

vs.

CHARLES and CHARLENE BAKER, ARGLEE and ALEAN SIMS, GRANVEL and LUCILLE FREEMAN, DORIS FREEMAN, JAMES and RUTH WELLS, WILLIAM and MAGGIE GRIFFIN, LUCY ANN [illegible]GS WILSON, NAOMI SMALLWOOD JACKSON, BLANCHE [illegible]ELLER, OZIREA ARBERTHA, CLAUDE and EDNA EARL HUGHES, MILUS and BEATRICE MC GEE, LYN TOY MC GEE JACKSON, EMANUEL and ELIZABETH ROSS, JOHN and QUANITA ANDERSON, JOELLA WILLIAMS, MAY B. LANG, WILLIE NELSON, JOSEPHINE LUKE NELSON, ROBERT and RUBY LEE YORK, JEREMIAH and IRENE JORDAN, WALTER and FAY CLAY, V. H. and ALMA HOGUE, JOHN and LULA ISABELL, HOWELL and CENELLA COLLINS, CLYDE and LILLIE ROSS, WILLIAM and EFFIE HOLLAND, ANNIE P. HUMPHREY, DORIS L. BOSS, HAROLD and JIMMIE HARRINGTON, ETHEL STEVENSON, HAROLD and TOMMIE ROBINSON, JOHN and MATTIE LEWIS, MAGGIE DAVIS, O. Z. and DOROTHY BROOKS, FREDERICK and LORETTA FLEMING, GENIE and HANNAH HUTCHINGS, CURTIS GREEN and DONALD and VEOLA TURNER, on their own behalf and on behalf of all others similarly situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1969.

No. .....

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Action Realty Co., et al. petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit entered on January 6, 1970.

OPINIONS BELOW.

The District Court filed a written opinion in this cause which was then known as Contract Buyers League, et al. v. F & F Investment, et al., reported at 300 F. Supp. 210 and reprinted in full as Appendix A to this petition. The opinion of the Seventh Circuit is reported at 420 F. 2d 1191, and reprinted in full as Appendix B to this petition. A three-judge court, convened pursuant to 28 U. S. C. § 2281, rendered an unreported opinion on another aspect of this litigation, which is reprinted in full as Appendix C to the Petition for Writ of Certiorari filed in the related case known as Universal Builders, Inc., et al., petitioners v. Sidney and Julia Clark, et al., respondents, which Appendices are adopted and incorporated herein.

THIS COURT'S JURISDICTION.

The judgment of the Seventh Circuit was entered on January 6, 1970. With one judge dissenting, petitioners' petition for rehearing was denied by order entered on March 5, 1970. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

This petition presents the same question presented in the petition of Universal Builders, et al., in the case known as Universal Builders, Inc., et al., petitioners, v. Sidney and Julia Clark, et al., respondents, which petition is hereby adopted in full, and in addition this petition presents the following question: Whether the Seventh Circuit correctly held that an antitrust action for allegedly fixing the price and terms of a long-term contract to purchase real property does not accrue when the contract is signed, but only when it is fully performed—30 years later in some instances. The former and the latter questions are identical. The principles applicable to a determination of the time of accrual of a cause of action on a contract to pay a "discriminatory price" must perforce be the same as the principles applicable to a determination of the time of accrual of a cause of action on a contract to pay a "fixed" price or a price derived from a conspiracy in restraint of trade.

STATUTES INVOLVED.

In addition to those statutes set forth by Universal Builders, Inc., et al., in its petition which is adopted by these petitioners, the following statutes are also involved:

(a) Sherman Antitrust Act, § 1, 26 Stat. 209, § 1; 15 U. S. C. § 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

(b) Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any District Court of

the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorneys fee."

(c) Clayton Act, § 4B, 69 Stat. 283, 15 U. S. C. § 15b:

"Any action to enforce any cause of action under Sections 15 or 15a of this title shall be forever barred unless commenced within four years *after the cause of action accrued*. No cause of action barred under existing law on the effective date of this Section and Sections 15a and 16 of this title shall be revived by said sections." (Emphasis supplied.)

(d) Illinois Antitrust Act, L. 1965, p. 1943, § 3, as amended by P. A. 76-208, § 1, 1969 Ill. Rev. Stat. 1967, Ch. 38, Par. 60-3:

"Every person shall be deemed to have committed a violation of this Act who shall:

"1. Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto. . . ."

(e) Illinois Antitrust Laws, L. 1965, p. 1943, § 7, as amended; Ill. Rev. Stats. Ch. 38, Par. 60-7 (2):

"Any action for damages under this subsection shall be forever barred unless commenced *within four years after the cause of action accrued;* provided that, whenever any action is brought by the Attorney General for a violation of this Act, the running of the foregoing statute of limitations, with respect to every private right of action for damages under the subsection which is based in whole or in part on any matter complained

of in said action by the Attorney General, shall be suspended during the pendency thereof and for one year thereafter. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act." (Emphasis supplied.)

STATEMENT OF THE CASE.

The facts in the case known as Baker v. F & F Investment Co., which are relevant to this Petition for Certiorari from the Seventh Circuit's decision on the issue of the statute of limitations, are nearly identical with the facts relevant to the petition filed by Universal Builders, Inc. et al., which petition is adopted herewith, with three minor exceptions. First, the properties in question sold to respondents by petitioners herein were in all instances used residential buildings, none of which were built by petitioners. Second, the very great majority of the buildings in question are not single family homes, but rather are multi-unit buildings containing two or more flats, from which income may be derived. Third, petitioners, as contract sellers, and in some instances, as the assignees of contract sellers of the real property in question, have been in business and have made sales to respondents under installment contracts for deed since the year 1956, and in most instances since prior to 1952. While most of the contracts which are the subject of this litigation were entered into during the decade 1950-1960, a substantial number were consummated during the period 1960-1965.

There is also a distinction between the installment contracts for warranty deed entered into between petitioners and respondents herein and the installment contracts entered into between petitioners Universal Builders, Inc., et al. and respondents in that litigation. The installment contracts which are the subject of this litigation provide

in a substantial number, and perhaps a majority, of cases that the contract buyer may obtain legal title when fifty percent of the purchase price has been paid.

ADOPTION OF PETITION FOR WRIT OF CERTIORARI FILED BY UNIVERSAL BUILDERS, INC., ET AL.

In all other respects petitioners herein adopt for their petition for writ of certiorari the contents of the petition filed by Universal Builders, Inc., et al., in the cause known as *Sidney Clark, et al. v. Universal Builders, Inc., et al.*, Nos. 17750 and 17751 in the Seventh Circuit. This cause, *Charles Baker, et al. v. F & F Investment, et al.*, Cause Nos. 17815 and 17816 in the Seventh Circuit, was consolidated for hearing and decision, with *Clark v. Universal Builders, Inc.*; counsel for appellants in both cases worked continuously in close cooperation, and no purpose would be served in filing separate petitions for writ of certiorari for review of the same decision below.

Respectfully submitted,

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NOS. [redacted] 208 213

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

UNIVERSAL BUILDERS, et al.,

Petitioners,

vs.

SIDNEY AND JULIA CLARK, et al.,

Respondents.

ACTION REALTY, et al.,

Petitioners,

vs.

CHARLES BAKER, et al.,

Respondents.

BRIEF IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

NOS. 1637, 1643

UNIVERSAL BUILDERS, et al.,

Petitioners,

vs.

SIDNEY AND JULIA CLARK, et al.,

Respondents.

ACTION REALTY, et al.,

Petitioners,

vs.

CHARLES BAKER, et al.,

Respondents.

BRIEF IN OPPOSITION

Respondents pray that the petitions for writs of certiorari filed in cases Nos. 1637 and 1643 be denied.

Since petitioners in case No. 1643 adopted as their argument the petition filed in case No. 1637, this single brief is filed in opposition to petitions filed in both cases. These cases were consolidated for argument in the Court of Appeals for the Seventh Circuit, and a single opinion was rendered by that Court.

QUESTIONS PRESENTED

1. Whether the courts below correctly decided that the Illinois statute of limitation on causes of action under 42 U.S.C. §1982 based upon racial discrimination in the price and terms of real estate instalment contracts, and upon subsequent discriminatory practices, which imposed a continuing inferior status on respondents and which inflicted continuing harm upon them, does not begin to run until the expiration of the contracts.

2. Whether the courts below correctly held in No. 1645 that the Illinois statute of limitation does not begin to run against respondents during the lifetime of the alleged conspiracy among petitioners to violate respondents' rights under 42 U.S.C. §1982.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the circuits, and no holding concerning the commencement of statutes of limitation at variance with any decision of this Court.

2. Petitioners raise no claim of substantial injustice that might be suffered by them. Only if the ruling of the courts below was overturned would any injustice be suffered, and then only by respondents.

I.

THE DECISIONS OF THE COURTS BELOW REGARDING COMMENCEMENT OF THE STATUTE OF LIMITATION DO NOT CONFLICT WITH ANY RULING OF THIS COURT OR OF ANY OTHER CIRCUIT.*

These cases challenge discriminatory practices which directly impaired the rights of respondent Negroes to acquire and hold residential realty in Chicago, Illinois. Respondents have alleged that petitioners took unlawful advantage of Chicago's racially segregated housing market and discriminatory lending practices, and thereby perpetrated continuing wrongs upon respondents through the use of unconscionable contracts and the exaction of discriminatory prices and terms. In No. 1643, respondents have alleged the existence of a conspiracy among petitioners to fix prices and to violate respondents' rights under 42 U.S.C. §1982 and the federal anti-trust laws.

* Whether state statutes of limitation should be applied to bar respondents' claims under 42 U.S.C. §1982 is a separate question which is raised by respondents in their Petition for Certiorari, filed June 4, 1970. (No. 1653.)

Under applicable federal law, the statute of limitation does not commence to run until the termination of the contracts. This issue was correctly decided by both courts below.

Petitioners are wrong in contending that the ruling below conflicts with previous decisions of this Court and of other circuits. The reasoning of the courts below is in accord with the rationale and holding in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Hanover, a shoe manufacturer, brought an anti-trust action against United Shoe Machinery Co., a producer of machinery, for refusing to sell machinery and for leasing its machinery at high rates and under harsh and illegal terms. United contended that Hanover's cause of action arose in the year the leases were first executed, and was therefore barred by the applicable statute of limitation. This Court rejected United's contention, holding that United's continuing violation of Hanover's rights gave rise to a corresponding continuing period within which Hanover could institute suit (392 U.S. at 502, n. 15):

> "... We are not dealing with a violation of law which, if it occurs at all, must occur within some specific and limited time span. ... Rather, we are dealing with conduct which constituted a continuing violation of the Sherman Act and which inflicted continuing and accumulating harm on Hanover. Although Hanover could have sued in 1912 for the injury then being inflicted, it was equally entitled to sue in 1955."

As *Hanover*, the cases at bar involve continuing exploitation in addition to unlawful original contracts. Here, as in *Hanover*, that exploitation was itself a legal wrong, and not merely the effects of a prior wrong.

The rule in *Hanover* was correctly applied in these cases. Respondents' cause of action here is based on continuing wrongs, exemplified by the exaction of excessive monthly payments and the enforcement of discriminatory contract terms, which went on (and still go on in most cases) long after the date of execution of the instalment contracts. Thus, the Court of Appeals observed that "Here the defendants [petitioners] have entered into a series of contracts which manifest an on-going relationship between the individual participants and constituting the alleged invasion of the rights of the plaintiffs [respondents]." (420 F.2d at 1200.)*

The "badge of slavery" imposed by petitioners on respondents continues so long as the contracts are in existence. A person held in servitude has a cause of action so long as he is held; the contracts here are the legal equivalent of contracts for unlawful servitude, and causes of action attacking those contracts cannot be extinguished by passage of time so long as the contracts continue.

* The District Court elaborated on the continuing nature of respondents' injuries, stating: "[The] immediacy of the alleged injury goes beyond the continuing collection of allegedly unlawful profit and enforcement of the contracts . . . Only the most parochial view of the Civil Rights Act would identify its ultimate intention to be simply the restoration of any monetary loss suffered on account of race. The abolition of slavery was to be a redemption of human dignity. The indignity alleged to have been suffered in this case cannot be confined to the dates of execution of the various contracts, but can be understood only in relation to the continuing activity whereby the alleged indignity continues to be inflicted and exploited . . . ." (300 F. Supp. at 221.)

In No. 1634, there is an additional reason for holding that the statute of limitation does not begin to run until the contracts have ended. In that case, respondents allege the existence of a conspiracy among petitioners to violate respondents' civil rights. The limitation period does not commence to run in conspiracy cases until the performance of the last overt act alleged to have caused damage. *Steiner* v. *20th Century Fox Film Corp.*, 232 F.2d 190, 194 (9th Cir. 1956).

The cases cited by petitioners are not in point because they did not involve a conspiracy or continuing violation of plaintiff's rights (*Berry* v. *Chrysler Corp.*, 150 F. 2d 1002 (6th Cir. 1945)); or because no injury or damage occurred within the applicable limitations period (*Fleischer* v. *A.A.P., Inc.*, 180 F. Supp. 717 (S.D.N.Y., 1959)); or because the defendant did not participate in the maintenance of a continuing violation (*Skouras Theatres Corp.* v. *Radio-Kieth Orpheum Corp.*, 193 F. Supp. 401 (S.D. N.Y., 1961)). State court cases and federal diversity cases are irrelevant; *Hanover* settles the rule to be followed in cases arising under federal statutes. Petitioners' discussion of the time at which a cause of action accrues is inappropriate. The question here is the effect of rules tolling the time at which the statute commences to run.

Petitioners have attempted to create an aura of conflict by citing broad maxims which have no applicability to the specific facts in this case. But petitioners cannot manufacture conflicts where none exist. The decision as to the running of the limitations period is in complete harmony with applicable rulings of this Court.

II.

SUBSTANTIAL INJUSTICE TO RESPONDENTS WOULD RESULT IF THE STATUTE OF LIMITATION WERE HELD TO BAR RESPONDENTS' CAUSES OF ACTION.

Petitioners have entered into long term contracts with respondents. The continuing nature of these contracts, combined with petitioners' obligation to convey title to property at a time in the future, obviously creates a risk of litigation between the contracting parties long after the contracts were signed.

The ruling of the courts below is consistent with prior rulings regarding the running of statutes of limitation. No injustice will result from applying the well established principles governing the tolling of limitation periods as to defendants who commit continuing wrongs and who engage in illegal conspiracies. The new rules which petitioners seek to have this Court apply would fly in the teeth of this Court's holdings that technical interpretation of statutes of limitation should not frustrate or bar meritorious causes of action.

In *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967), this Court said that limitations statutes should be interpreted ". . . in light of the general purposes of the substantive statute . . . and with due regard to those practical ends which are to be served by any limitation of time within which an action must be brought."

The end sought by petitioners is to leave many of the respondents without a remedy, contrary to the broad relief contemplated by the Civil Rights Act of 1866, including 42 U.S.C. §1988.

Not until 1968, when this Court decided *Jones* v. *Mayer*, 392 U.S. 409 (1968), did a judicial remedy appear to be available to respondents. These actions were filed in January, 1969. To restrict the availability of a remedy at this time would result in grave injustices against Negro citizens who cannot fairly be said to have slept on their rights or ignored available judicial remedies.

Petitioners' reliance upon *Toussie* v. *United States*, 397 U.S. 112 (1970), is misplaced. *Toussie* held that the statute of limitation for the crime of failing to register for the draft ran from the initial refusal to register. This holding was expressly based on a finding that the offense was *not of a continuing nature*. (397 U.S. at 120-121.) The decision is consistent with the rule in criminal cases of continuing statutes strictly, and in favor of the accused.

Petitioners also argue that the decisions below will inhibit selling to Negroes on credit. But surely, providing a remedy commensurate with the period of injury will have no effect on lawful transactions, but rather will assure Negro citizens that they have a legal means to seek redress against discriminatory contracts so long as the contracts, and perforce the discrimination, continue. The rulings below correctly recognize the right to sue so long as the plaintiff is suffering from the effects of racial discrimination.

The District Court characterized petitioners' arguments as being "lost in the metaphysic of 'essential' act of injury." (300 F.Supp. at 220-221.) This litigation is an attempt to provide a remedy for a great many Negro purchasers of real estate from the racial discrimination and exploitation practiced by petitioners. Respondents live with the impact of petitioners' activities every day of their lives.

For all the foregoing reasons, respondents urge that the petitions filed in Nos. 1637 and 1643 be denied.

Respectfully submitted,

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